IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1464

PERRY L. EDGE, Administrator
of the Estate of Bozzie L. Edge, dec.,

Petitioner,

v.

UNION MEDICAL CENTER, INC. a corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was filed and entered on December 6, 1973. A subsequent suggestion for rehearing was denied on February 11, 1974. The petition for writ of certiorari was filed with this Court on May 21, 1975. Said petition

was clearly not filed within the 90-day time period set forth in 28 U.S.C. 2101(c) (1949). The Court, therefore, does not have jurisdiction to entertain the petition even if the Court would otherwise have jurisdiction under 28 U.S.C. 1254(1) (1970).

STATUTE INVOLVED

Title 28, Section 2101(c) of the United States Code provides:

> "Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days." June 25, 1948, c. 646, 62 Stat. 961; as Amended May 24, 1949, c. 139, § 106, 63 Stat. 104.

COUNTERSTATEMENT OF THE CASE

The judgment of the United States Court of Appeals for the District of Columbia was filed in the case herein on December 6, 1973. On January 2, 1974, the appellant below filed motion for leave to file petition for rehearing en banc. On January 11, 1974, appellee filed motion in opposition to leave to file petition for rehearing en banc. A per curiam order of the Court of Appeals, dated January 30, 1974, directed the clerk to file appellant's petition for rehearing en banc as a suggestion for rehearing en banc. Appellant's suggestion for rehearing en banc was then filed on January 30,

1974. A letter dated February 11, 1974, was sent by the Court of Appeals to appellant's counsel. It stated that no judge had requested a vote on the suggestion for rehearing en banc and that no action would be taken on said petition. There is no indication that the Court of Appeals was prepared to take any further action on the suggestion for rehearing.

ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

A review of the procedural aspects of the case at bar clearly shows that petitioner filed his petition for writ of certiorari outside the 90 day statutory period set forth in 28 U.S.C. 2101(c) (1949). While it is true that petitioner, appellant below, filed motion for leave to file petition for rehearing en banc, this does not help his cause. A timely petition for rehearing tolls the running of the time within which to apply for writ of certiorari. Petitioner, however, received a letter from the Court of Appeals dated February 11, 1974, stating that no further action would be taken on the judgment filed and entered on December 6, 1973.

Under circumstances most favorable to petitioner, he could have filed the petition for writ of certiorari until July 11, 1974. The suggestion for rehearing was denied on February 11, 1974, commencing the 90-day time period set forth in the statute. *Department of Banking v. Pink*, 317 U.S. 264, 266 (1942). Assuming, *arguendo*, that final entry of judgment occurred on February 11, 1974, would help petitioner not at all. Nor did petitioner ever file for a 60-day extension as permitted under 28 U.S.C. 2101(c) (1949).

Petitioner alleges no unusual circumstances, indeed no circumstances at all, which would toll the running of the statute.

The significance of the jurisdictional problem is not grasped by petitioner and he addresses the issue with what is at best a typographical error.

It is submitted that the judgment of December 6, 1973, was a final judgment of the Court of Appeals; that said Court's denial of petitioner's suggestion for rehearing en banc tolled the time period set forth in 28 U.S.C. 2101(c) (1949) until February 11, 1974, at the latest; that the petition for writ of certiorari filed May 21, 1975, is untimely, and that, accordingly, the petition should be denied. *Territo v. United States,* 358 U.S. 279 (1959).

CONCLUSION

For the foregoing reason, it is respectfully submitted that the Court does not have jurisdiction to entertain the petition. Therefore the petition for writ of certiorari should be denied as untimely filed.

Respectfully submitted,

DONAHUE & EHRMANTRAUT

By _____

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